ORIGINAL

No. 92-1002

Supreme Court, U.S.
FILED
JAN 21 1993
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

CHICAGO HOUSING AUTHORITY,

Petitioner,

v.

JEROME HUNT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner, the Chicago Housing Authority ("CHA"), asks this Court to decide "[w]hether a local government agency [i.e., CHA] may be liable under 42 U.S.C. § 1983 for discharging an employee [i.e., respondent Jerome Hunt ("Hunt")] in violation of his constitutional rights when the termination was approved by only one member of the [agency's seven-member Board] and ... the other six members were not aware of and did not participate in the decision to discharge the employee." CHA's Petition For A Writ of Certiorari in No. 92-1002 ("Pet." or "petition") at i. But this case does not present that question. See pp. 16-23 infra. Rather, the only question presented by the decision below is:

Did the Seventh Circuit Court of Appeals, in an unpublished order, properly hold that the evidence supported the jury's verdict that a municipal corporation's entire Board of Commissioners was directly responsible for an employee's discharge in violation of his federal constitutional rights?

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STATEMENT

CHA, which is the municipal corporation that manages public housing in Chicago, fired Hunt, who then filed this action, R. 1[1], claiming that the discharge violated his rights under the First and Fourteenth Amendments to the United States Constitution to speak freely (the "free speech claim"), see e.g., Mt. Healthy City School Dist. Board of Education v. Doyle, 429 U.S. 274, 281-87 (1977), and under the procedural and substantive components of the Fourteenth Amendment's due process clause (the "due process claims"). See e.g., Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) (procedural due process claim); Harrah Independent School Dist. v. Martin, 440 U.S. 194, 197-98 (1979) (substantive due process claim).[2]

The case was tried three times and appealed twice. After the first jury returned verdicts in Hunt's favor, District Judge James B. Parsons entered a judgment notwithstanding the verdict ("jnov"). R. 172. Hunt appealed, and in the first of two unpublished decisions, the Court of Appeals for the Seventh Circuit reversed and remanded for a new trial. R. 214, 215. After a mistrial, the third jury rendered verdicts in Hunt's favor on his free speech and due process claims. R. 319. CHA then appealed from the judgment entered on those verdicts seeking either a second jnov or a fourth

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[1] Hunt employs the same citation conventions in this brief that CHA used in its petition, see Pet. at p. 2 n. 1, except that transcripts of the trials prior to the one now under review are identified by the date, e.g., T. of Dec. 6, 1989 at 1, and the parties Stipulation of Uncontested Facts (see R. 357) is identified as "Stip." e.g., Stip. ¶ 1.

[2] Hunt also advanced pendent state law claims, but they are not relevant to CHA's petition. See App. at 2a.

trial. R. 342. In the second unpublished decision, however, the court of appeals affirmed the judgments against CHA. App. at 1a-26a.[3] CHA's petition seeks review of that second decision.

In its Statement, CHA contends that the record establishes that CHA's "seven-member Board did not fire Hunt." Pet. at 3. Rather, according to CHA, the evidence shows that "Hunt was fired by lower-level officials 'with the approval of' only one Board member." Id. (citing App. at 6a) (emphasis in petition). Indeed, CHA goes so far as to contend that "there was no evidence that the other six Board members even knew that Hunt had been fired (let alone evidence that they participated in that decision)...." Id.; see also Pet. at 8, 10, 14, 15 n.7, 16-17 (same).

CHA then links that reading of the record to a holding it ascribes to the court of appeals. In its Statement, CHA says that the "court below held ... that the evidence [that Hunt had been fired by one Board member and CHA's executive director, not by CHA's whole Board] was 'sufficient' ... to impose liability on the CHA." Pet. at 3 (citing App. at 26a). By that reading of the court's decision, CHA can repeatedly assert that the court of appeals upheld "liability based on the acts of a single Board member." Id.; see also id. at 9, 10, 12, 14-16, 22 (same).

But CHA misstates the appellate court's holding and mischaracterizes the record by offering an incomplete description of the

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[3] The court of appeals also reversed judgments against two individual defendants holding that they were entitled to qualified immunity. App. 9a-13a. Hunt has not sought review of that part of the court of appeals' order.

events that led to Hunt's discharge, particularly the Board's participation in the decision to discharge Hunt in retaliation for his criticism of CHA's elevator division. The Statement here corrects those deficiencies. See Sup. Ct. R. 15.1, 24.2.

I. HUNT'S EMPLOYMENT AT CHA

Jerome Hunt has lived in CHA housing since 1966. App. at 2a; Tr. 349. CHA hired Hunt as its Resident Elevator Representative in October 1980. Pl. Ex. 1; Stip. at ¶ 1; Tr. 356. Under the terms of his job description, Hunt had numerous duties. Id.; see also App. at 2a-3a (describing Hunt's other duties, and his performance of his duties). Among other things, he was to serve on the CHA elevator committee, Pl. Ex. 3, a working unit of CHA officials and employees charged with "monitor[ing] all facets of [CHA's] elevator operation...." Pl. Ex. 14. Hunt was to present the views of residents concerning elevator operational problems to the committee. Pl. Ex. 3. But in 1981, after the committee had met about three times, Joseph Bell, the committee's chairman, stopped the committee's meetings. Tr. 58, 248, 371.

Hunt was also to "[a]ssist in formulating a general plan for improvement of elevator conditions and service." Pl. Ex. 3. Hunt therefore assumed responsibility for "putting into order the work tickets and invoices submitted by the elevator repairmen, ... and [keeping] a record of elevators kept out of service,...." App. at 3a. To do that, Hunt devised a form to determine the frequency of elevator breakdowns and the amounts paid to Westinghouse, CHA's elevator contractor. Tr. 361-66; Pl. Ex. 17.

II. HUNT'S CRITICISM OF CHA

As Hunt reviewed Westinghouse's work tickets and the reports of elevator breakdowns, he discovered that the same elevators were out of operation day after day even as Westinghouse billed CHA for many hours of work to repair them. Tr. 378-91, 407-08; Pl. Ex. 18-24, 28, 52 at 46-8, 60. Hunt therefore began to send reports to his supervisors in which he said that CHA was spending millions of dollars for very poor elevator service. Id.; see App. at 3a.

Hunt also attended meetings of CHA's Board of Commissioners to discuss CHA's elevator service. Tr. 368. At the February 24, 1981 Board meeting, Charles Swibel, then the Board's chairman, told Hunt to submit his reports "through channels." Pl. Ex. 50 at 1. When Hunt asked if the Board had seen any of his previous reports, Swibel replied, "I don't know what the nature of these reports were." Id. at 1-2. At the May 12, 1981 Board meeting, after Hunt informed the Board about the continuing problems in elevator service at CHA, Swibel told Hunt: "I resent, on behalf of the Board, that as an employee you have seen fit to come before this Board before giving your superiors and the people that you work for an opportunity to discuss with you and the tenant councils any statement that you might bring to this Board." Pl. Ex. 51 at 34.

In June, 1981, Charles Clarke became Hunt's supervisor. Tr. 35-6. After Hunt sent Clarke a memorandum in which Hunt complained that CHA's elevator service was worsening, Pl. Ex. 24, Clarke removed Hunt from the Central Maintenance office, where he had been working, and required him to work instead at an office in Dearborn

Homes, the housing development where Hunt lived. Pl. Ex. 29; Tr. 60-5, 78, 153-54.

At the September 8, 1981 meeting, Hunt told Swibel and Andrew Mooney, then CHA's executive director, that he (Hunt) could not function under his job description because the elevator committee had stopped meeting and because he was not informed of CHA's plans concerning elevator service. Pl. Ex. 52 at 46. He also told the Board that Westinghouse was "making money while their men are goofing off" and even "trying to sabotage" the repair program. Id. at 47, 53. Then Hunt told the Board that "I have been constantly told by people that you come to the Commissioners, you are going to get fired, Jerome." Id. at 56.

James Simpson, CHA's Director of Maintenance, attended the September 8 Board meeting, and later that day, he ordered Hunt to leave work. Pl. Ex. 22 at 2, Tr. 90-4, 266, 394-6. When Hunt refused, Simpson told Clarke to place Hunt on probation. Id. Clarke did so even though he never placed other employees, even those who had violated his direct orders, on probation. Tr. 94; 114, 136-37, 252. Hunt advised the Board that Clarke and Simpson had put him on probation. Pl. Exs. 22, 53 at 28-9.

At CHA's January 12, 1982 Board meeting, Hunt told the Board that "[w]e still have a very severe problem with the elevator situation. ... Millions of dollars have been spent, and right now millions of dollars are continuing to be spent, and there is absolutely no control by this Board nor by the executive staff over these funds." Pl. Ex. 53 at 28. Hunt also reported that, while

CHA's mechanics lacked the parts to fix the elevators, CHA had "given [parts] to Westinghouse, and Westinghouse is selling them right back to CHA." Id. at 30. Hunt concluded that "all [the elevator repairmen] have to do is go in, sign their name in the morning, then leave for the rest of the day." Id. Mooney then raised his voice and told Hunt that "I finally have gotten tired of you talking to this board this way." Id. at 33.

"Mr. Hunt's charges were not without foundation; the serious inadequacies of CHA management and abuses by the Westinghouse repairmen are discussed in detail in a report prepared by HUD [United States Department of Housing and Urban Development]." App. at 3a n. 2. That report concluded, among other things, that "CHA's program of elevator maintenance is in total chaos," and that "[r]esponsibility for [the elevator maintenance] problem must be shared equally by the CHA and its outside elevator contractor (Westinghouse)." Pl. Ex. 11 at 144.

By the November 23, 1982 Board meeting, Mooney had replaced Swibel as chairman of CHA's Board, and Elmer Beard had replaced Mooney as the Executive Director. Pl. Ex. 54 at 1. At that meeting, Hunt told the Board that he had "written reports on top of reports ... [but t]he elevator situation in public housing has gotten worse under Mr. Mooney's administration," and that "Mr. Mooney has not done anything about [the elevator program]. The

cost is prohibitive, the service is ridiculous. People are dying[4], and people are making money, Mr. Mooney." Id. at 38-40.

On December 10, 1982, Hunt sent a letter to the Secretary of HUD, with copies to CHA's Commissioners, accusing CHA of mismanagement and requesting that HUD investigate CHA. Pl. Ex. 27. Ten days later, on December 20, 1982, the full Board met in executive session to discuss Hunt's employment. Pl. Ex. 56.

III. HUNT'S DISCHARGE

The December 20, 1982 meeting was attended by Mooney, the Board's Chairman, every one of the other six members of the Board, and Beard, CHA's executive director. Pl. Ex. 56 at 2. Shortly after the discussion of Hunt began, Commissioner Finney said, "I have a problem seeing why [Hunt] would come to a [Board] meeting and publicly vent his frustration." Id. at 16. Commissioner Nash suggested that CHA should revise Hunt's job description "or we terminate him." Id. at 17. Finney said that the Board should "not get involved in termination," id., because, as he put it, "I worry about getting involved in these matters." Id. at 19. But he suggested instead that Beard, CHA's executive director, should "take this matter under consideration, to deal with it and get it out of here." Id. at 18. Finney then added that Hunt should be given a new job description "and then ... [i]f he doesn't perform, he should be taken out of the organization." Id. at 19. The full Board then agreed to this suggestion. Id. at 20.

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[4] Residents of CHA's developments had been injured or killed because of faulty elevators. Tr. 405, 702.

In fact, the Board was not concerned about changing Hunt's job description. Hunt himself had asked Clarke for "a complete review of my job description," Pl. Ex. 24 at 2, and Hunt had told the Board that, because the elevator committee had stopped meeting, he had been prevented from fulfilling the duties described in his existing job description. Pl. Ex. 52 at 46. But Hunt was discharged without anyone ever reviewing his job description. Tr. 268-69, 405; see App. 5a ("Apparently nothing was done to revise Mr. Hunt's job description....").

At the same December 20, 1982 meeting at which Hunt's discharge was discussed, the Board hired James Gilmartin as CHA's personnel director. Pl. Ex. 56 at 2-11. A few weeks after the December 20, 1982 meeting, and thus shortly after Gilmartin had arrived at CHA, Mooney directed Gilmartin to convene a "hearing" concerning Hunt. Pl. Ex. 29. Hunt was not informed of this "hearing." Id.; Tr. 122-3, 151, 410-11. But on January 21, 1983, Gilmartin convened a meeting attended by himself, Clarke and three other CHA managers.[5] Id.

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[5] CHA's Statement says that the January 21, 1983 meeting was convened because Michael Davis, one of CHA's housing managers, had complained that Hunt had committed "'several acts of gross insubordination' and had 'harass[ed]' Davis's office." Pet. at 7 (quoting Def. Ex. 32). But CHA may not legitimately press that understanding of the reason for the meeting because when it did so during the second trial, Hunt responded by offering Davis's personnel file to show that the "insubordination" and "harassment" of which Davis complained was that Hunt had reported that Davis was violating CHA policy by conducting a law practice from his CHA office while on CHA's time and that Davis was later discharged from CHA for precisely that conduct. Tr. of December 6, 1989 at 478-82; Pl. Ex. 55. By the third trial, CHA had decided to forego discussing Davis's complaints concerning Hunt, to keep the court from entering Davis's personnel file into evidence. Tr. 674-677.

On January 25, 1983, Gilmartin sent a memorandum to Mooney telling him that the group had discussed Hunt's "negative characteristics ... and it was made clear by those in attendance that something had to be done regarding the future employment of Mr. Jerome Hunt with the CHA." Pl. Ex. 29 at 2. Gilmartin also wrote that termination "would be difficult to implement because of the lack of written documentation supporting the allegations [against Hunt]." Id. Indeed, except for the period during which Simpson and Clarke put Hunt on probation for complaining about the elevators at the September 8, 1981 Board meeting, Hunt's personnel record was spotless. Pl. Exs. 1, 2, 6-10. So Gilmartin recommended to Mooney either that Hunt's position be eliminated or that he be more closely supervised under a revised job description. Pl. Ex. 29 at 3. Finally, Gilmartin wrote that "[i]f Mr. Hunt continues his pattern of insubordination or disruption, he should be placed on probation. If, during the probation period, he continues to act in a disruptive manner he should be terminated." Id.

But CHA never revised Hunt's job description or supervised him differently. Tr. 268-69, 405; see App. 5a. Instead, on January 25, 1983, the same day that Gilmartin sent his memo to Mooney, Clarke requested Hunt's discharge because Hunt had attended another Board meeting to present the residents' grievances concerning elevator service. Pl. Exs. 30, 31, Tr. 101-105, 420-27; see App.

at 6a.[6] Gilmartin forwarded Clarke's recommendation to Mooney with Gilmartin's concurrence that Hunt be terminated. Pl. Ex. 31; Tr. 155.

On February 22, 1983, Harold Washington won the Democratic primary election for Mayor of Chicago, and Hunt won money in the state lottery. Tr. 127-28, 427-9; see App. at 6a. Hunt celebrated that night and came to work drunk the next day. Id. Clarke again requested that Gilmartin fire Hunt and Gilmartin in turn recommended Hunt's discharge to Mooney. Pl. Ex. 34, 35; Tr. 161-2. But Gilmartin admitted that other employees at CHA were not terminated for drinking except for multiple instances of drunkenness or when the drinking "caused a severe problem out in the field." Tr. 162-4.

Each workday morning, Hunt was required to travel to and from his housing development, Dearborn Homes, where Clarke had assigned him to work, and CHA's Central Maintenance office, where the elevator maintenance division was housed, to "sign in" for work. Tr. 60-5, 78, 137, 153-4, 429-35; Pl. Exs. 29 at 2, 37. Then, after completing his workday at Dearborn Homes, Hunt was required to return to Central Maintenance to "sign out." Id. On April 22

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[6] Clarke claimed that Hunt's conduct violated CHA's "policy" prohibiting employees from attending Board meetings on company time. But Clarke had neither seen this "policy" in writing, nor did he know where he had learned of it. Tr. 105-12. Moreover, he was inconsistent as to whether Hunt had ever violated this "policy" before January 25, 1983. Compare Tr. 108 with Tr. 227-29. In any event, Hunt not only testified at trial, but also maintained at the time, that he took leave time from work whenever he attended Board meetings, including the January 25, 1983 meeting. Tr. 423; Pl. Exs. 22 at 2, 52 at 45, 53 at 29.

and 25, 1983, Hunt worked late at Dearborn Homes, and when he returned to Central Maintenance just shortly after the office had officially closed, he was not permitted to sign out. Id.

On April 26, 1983, Clarke, who knew that Hunt had worked two full days on April 22 and 25, 1983, nonetheless notified Hunt that he would be docked two days' pay for failing to sign out on those days. Id.; see App. at 6a. In the conversation that ensued, Hunt said that Clarke knew Hunt had worked that day and that Clarke was a "damned liar" for suggesting otherwise. Id. That day, after Hunt returned from a Board meeting, Clarke suspended him pending termination. Id.

Clarke later admitted that other employees had sometimes neglected to sign out and even disobeyed his direct orders, but that he neither disciplined anyone else for such conduct nor discharged anyone other than Hunt during his tenure as manager of the elevator division. Tr. 114, 136-37, 251-52. And though Gilmartin later described neglecting to sign out as a "minor infraction," Tr. 166, he again recommended Hunt's discharge based on Clarke's request. Pl. Ex. 39; Tr. 141-2, 195-97.

According to Gilmartin, "[t]he chairman [of CHA's Board] would ... present to the board ... all personnel actions ... [including] terminations" for its approval. Tr. 141. On May 18, 1983, Mooney notified Gilmartin that "Mr. Beard and I agree with your recommendation [that Hunt be fired]." Pl. Ex. 40, Tr. 142. Gilmartin thereafter sent Hunt "official notification ... that your separation will be effective April 27, 1983." Pl. Ex. 41.

At Hunt's request, CHA convened a hearing regarding the propriety of his termination, but not until June 8, 1983, six weeks after the effective date of Hunt's discharge. Pl. Exs. 33, 38, 41, 42; Tr. 120, 150, 160, 168. Gilmartin presided at the hearing and told Hunt that he was discharged solely for the events of April 22 and 25, 1983. Pl. Ex. 42, 43; Tr. 194-5, 213-14. After the hearing, however, but before Gilmartin rendered his decision, Clarke told Gilmartin that Hunt "was constantly writing memos and constantly berating the entire system from the chairman of the board of directors right on down to Charlie Clarke." Tr. 144-5, 171-3. On June 14, 1983, Gilmartin notified Hunt that "[w]e ... have concluded that your termination was for just cause and in compliance with current CHA policies and procedures." Pl. Ex. 43.

IV. THE DISTRICT COURT'S JURY INSTRUCTIONS AND THE COURT OF APPEALS' DECISION

With regard to CHA's liability, the district court instructed the jury, in relevant part, that CHA:

> is a municipal corporation. Under Illinois law, CHA's board of commissioners is charged with the duty to make CHA's policy as to discharge of employees. To find CHA liable on Hunt's [constitutional claims], you must find CHA's Board responsible for the unlawful conduct.
>
> * * *
>
> If Hunt has merely shown that the CHA board failed to investigate the basis for his discharge ... you should find in favor of CHA on [the] free speech claim....

Tr. at 886-87, 899-900, 903-05; R. 321; App. 15a. Thus, as CHA concedes: 1) "the jury was instructed ... that ... CHA's final policymaker under Illinois law was its seven-member Board," Pet. at 14 (citations omitted), see e.g., Jett v. Dallas Independent School District, 491 U.S. 701, 737 (1989) (a municipal corporation can be

liable under § 1983 only if those with final policymaking authority under state law caused the deprivation of rights); Parker v. Chicago Housing Authority, 730 F. Supp. 115, 119-120 (N.D. Ill. 1989) (under Illinois law, CHA's Board has final policymaking authority for employment decisions); and 2) "the jury was instructed correctly that there must have been evidence that 'the board decided to discharge Hunt' in violation of his constitutional rights." Pet. at 9 (citations omitted); see Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986) ("recovery from a municipality is limited to ... acts which the municipality officially sanctioned or ordered.").

Once the district judge instructed the jury that only CHA's Board "ha[d] the power to make official policy on ... [employment] issue[s]..., it [was] for the jury to determine whether ... [the Board's] decisions ... caused the deprivation of [Hunt's] rights." See Jett, 491 U.S. at 737. Thus, the jury's verdicts against CHA on the constitutional claims mean that the jury found that CHA's whole Board (not just a single Board member) was, indeed, "directly responsible" for the deprivation of Hunt's constitutional rights.

The court of appeals (Posner, Ripple, Manion, JJ) affirmed the judgments against CHA concluding that the "evidence, viewed in the light most favorable to Mr. Hunt, was sufficient to support the jury's verdicts [as to each of the constitutional claims]." App. at 26a.

REASONS WHY THE PETITION SHOULD BE DENIED

CHA contends that the court of appeals upheld "liability [against CHA] based on the acts of a single Board member." Pet. at 3; see p. 16 n. 9 infra (citing numerous reiterations of this contention in Petition). This contention is, in turn, the predicate for each of the three reasons CHA offers for granting the petition: 1) that "the court of appeals' holding that municipal liability may be based on the conduct of one member of a seven member Board is ... inconsistent with Monell [v. New York City Dep't of Social Services, 436 U.S. 658 (1978)] and its progeny." Pet. at 12, see id. at 12-17; 2) that "the circuits are divided on whether the conduct of one member of a policymaking board can subject a municipality to § 1983 liability," id. at 18, see id. at 18-20; and 3) that the question of whether one member of a policymaking board can subject a municipality to § 1983 liability is, in any event, "a recurring and important issue." Id. at 20, see id. at 20-22.

Regardless of whether the question CHA presents would be "important" enough to merit this Court's plenary consideration in an appropriate case if the circuits were truly split on the issue, neither the court of appeals' decision nor the record raises that question. See § I, infra. And the circuit conflict CHA posits

simply does not exist. See § II, infra.[7] Rather, CHA's petition is just a plea that this Court review an unpublished appellate decision holding that, under a settled and undisputed standard for finding municipal liability under § 1983, there was sufficient evidence to support the jury's verdict that CHA unlawfully discharged Hunt. Such a plea is plainly insufficient. See United States v. Johnson, 268 U.S. 220, 227 (1925).[8]

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[7] Since there is no split in the circuits as to whether one member of a policymaking board can subject a municipality to § 1983 liability, the issue CHA posits does not, in any event, appear to be "recurring." See Pet. at 20. Moreover, no matter how "important" CHA's question might be in the abstract, the idea that the court of appeals' particular decision here has great "practical significance," Pet. at 22, because it could somehow have a "profound and adverse [financial] impact on local government agencies," id. at 20, is surely wrong.

The decision is unpublished. App. at 1a. And, under Rule 53 of the Circuit Rules for the Court of Appeals for the Seventh Circuit ("Circuit Rule 53"), an unpublished Seventh Circuit order "[e]xcept to support a claim of res judicata, collateral estoppel or law of the case, shall not be cited or used as precedent." Id. at (b)(2)(iv) (emphasis supplied). Thus, other municipal corporations know that the court of appeals' decision will not be cited as a basis for upholding a municipality's liability in another case.

[8] The petition is also an inartful attempt to overcome the daunting standard for review of jury verdicts to which CHA succumbed in the court of appeals. See App. at 25a ("In determining whether the evidence to support the verdict, we take the evidence and all reasonable inferences from it in the light most favorable to the party winning the verdict.") (citations omitted). Indeed, it appears that, bereft of any legitimate basis for seeking the writ, CHA rummaged about the case law for a § 1983 question that might arguably be "important" enough to merit this Court's review, and then sought, by tortured readings of both the court of appeals' decision and the record, and by manufacturing a circuit conflict, to present that question in its petition.

I. NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTION PRESENTED IN THE PETITION

A. CHA invokes a single clause in the court of appeals' lengthy order ("After Mr. Hunt was terminated with the approval of Chairman Mooney and the Executive Director,...", App. at 6a) to contend that when that court upheld the jury's finding that "CHA was directly responsible for firing Mr. Hunt," App. at 18a, it thereby upheld a jury verdict that "impose[d] liability on the CHA ... based on the acts of a single Board member...." Pet. at 3.[9] The question it asks this Court to review depends upon that contention. Pet. at i; see p. 14 supra. But the court of appeals did not uphold a verdict finding that Hunt was fired "by lower-level officials 'with the approval of' only one Board member." Pet. at 3 (emphasis in Petition, citation omitted).

The court of appeals' observation that "Hunt was terminated with the approval of Chairman Mooney and the Executive Director", App. at 6a, is, of course, true: Mooney and Beard did authorize Hunt's discharge. Pl. Ex. 40, Tr. 142. But that does not mean that the court concluded that only Mooney and Beard, and not CHA's Board acting collectively, had caused the constitutional deprivation. Nor does it mean that the jury predicated its verdict upon a determination that the full Board had not "officially sanctioned or ordered," Pembaur, 475 U.S. at 480, Hunt's discharge.

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[9] CHA's repeated assertion that the court of appeals upheld "liability based on the acts of a single Board member," Pet. at 3; see id. at 9, 10, 12, 14-16, 22, is accompanied by no citation other than the single sentence fragment that appears at p. 6a in the appendix.

The court of appeals noted Mooney and Beard's "approval" of the termination only after it had reviewed the evidence of the whole Board's culpability. App. at 2a-7a.[10] More importantly, the court of appeals was clearly of the view that, under settled law (as properly set forth in the jury instructions), for CHA to be liable for firing Hunt, CHA's Board of Commissioners itself (not simply an individual Board member) must have been directly responsible for the termination. See App. at 18a n. 8 ("In the present case, the district court properly decided ... [the] issue ... [of] the identity of those officials to whom state law has delegated policy-making authority.") (emphasis added); id. at 15a (quoting district court's jury instruction that "[u]nder Illinois law, CHA's board of commissioners is charged with the duty to make CHA's policy as to discharge of employees. To find CHA liable on Hunt's free speech claim, you must find CHA's board responsible for the unlawful conduct.") (emphasis added); see also, App. at 15a-19a (approving this instruction).

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[10] In particular, the court noted that the former chairman of CHA's Board, Charles Swibel, had "expressed displeasure at Mr. Hunt's voicing his criticisms in public," and that Mooney, who would later become chairman of CHA's Board, "told Mr. Hunt ... 'I finally have gotten tired of you talking to this board this way.'" Id. at 3a-4a (quoting Pl. Ex. 53 at 28). Moreover, the court of appeals reviewed the transcript of the Board's December 20, 1982 meeting in depth. It quoted Commissioner Finney's expression of dissatisfaction that Hunt would "come to a [Board] meeting and publicly vent his frustration," App. 4a (quoting Pl. Ex. 56 at 16), and Finney's statement that Hunt should be "taken out of the organization." Id. at 5a (quoting Pl. Ex. 56 at 19). And while the court noted that the Commissioners had discussed revising Hunt's job description, it also recognized that, in fact, "nothing was done to revise Mr. Hunt's job description" before he was discharged. Id. at 5a.

CHA's reading of the court of appeals' decision cannot be squared with the text of that decision, particularly that court's expressed understanding of the law. Since the court of appeals approved the jury's verdict specifically because the jury instructions properly told the jurors that they could find CHA liable only if "CHA's board of commissioners [itself was] responsible for the unlawful conduct," App. at 15a, it is inconceivable that the court then read the jury's verdict as finding liability based on Mooney's acts alone.[11] Indeed, the court of appeals unequivocally said that "[t]here is no realistic possibility that the jury based the CHA's liability ... on the theories that it merely approved the discharge or that it delegated its policymaking authority ...," App. at 17a (emphasis supplied), and that "it [is] extremely doubtful that ... [the] verdicts against CHA on ... [the] due process claims were based on a theory of derivative liability." Id. at 18a.

Since the court of appeals' decision affirmed a verdict finding that CHA's whole "board of commissioners [was] responsible for the unlawful conduct," App. at 15a, there was no occasion for

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[11] This understanding of the court of appeals' decision follows not only from the text of the opinion and the jury instructions, but also from Hunt's litigation position. As CHA concedes, "Hunt argued in the court of appeals that the judgment against the CHA could be sustained because the Board itself decided to fire Hunt at the Board meeting held on December 20, 1982." Pet. at 15 n. 7. CHA's reading of the decision below is, therefore, that the court of appeals approved a jury verdict that was in conflict not only with that court's clearly expressed view of the law (as properly set forth in the jury instructions), but also with the appellee's argument as to the implication of the facts and the law.

the court of appeals even to address the question of whether "the conduct of one member of a policymaking board can subject a municipality to § 1983 liability." Pet. at 18 (emphasis supplied). And that being so, CHA does not advance its position by its repeated complaint that the court of appeals did not "attempt to explain its ... decision," Pet. at 10, regarding § 1983 liability based on the acts of one Board member. See also, id. at 3 ("the court below held - without explanation - that the evidence was 'sufficient.'") (citation omitted). The court of appeals explained no such holding because it rendered no such holding.

B. As the text of the court of appeals' decision decisively rebuffs CHA's reading of it, so the record rebuffs CHA's contention that "there was no evidence that the other six Board members even knew that Hunt had been fired (let alone evidence that they participated in that decision)...." Pet. at 3. Indeed, though CHA claims not to see the evidence on which the jury relied, the court of appeals "examined the record thoroughly" and was thereby "convinced that, ... [t]he evidence ... was sufficient to support the jury's verdicts both on the First Amendment claim and the due process claims, and, therefore, the district court's denial of judgment notwithstanding the verdict was correct." App. 25a-26a.

CHA "may be held liable under § 1983 ... for 'acts ... which [its Board of Commissioners] ... officially sanctioned or ordered." City of St. Louis v. Prapotnik, 485 U.S. 112, 123 (1988) (quoting Pembaur, 475 U.S. at 480). There are two possible bases on which the jury could have concluded that CHA's Board sanctioned or

ordered Hunt's discharge because of his criticism of CHA's poor elevator maintenance.

First, CHA's personnel director Gilmartin testified that discharges at CHA began with a request from a division manager to Gilmartin who would then recommend dismissal to the Board through its chairman or the executive director. Tr. 141-3. And, in this particular case, Clarke requested Hunt's discharge; Gilmartin then recommended it to Mooney, the chairman of CHA's Board; and Gilmartin later received a note from Mooney specifically approving that recommendation. Id.; Pl. Exs. 37, 39, 40. Despite CHA's assertion that "Hunt's termination was not ... approved by 'the full board,'" Pet. at 7-8 (citation omitted), there was no evidence whatsoever to suggest that Hunt's case was an exception to the rule of Board approval. The jury was, therefore, free to conclude that since Hunt's discharge otherwise followed the normal process, CHA's Board approved the discharge.

In any event, the evidence supports the conclusion that CHA's full Board "officially sanctioned or ordered," Pembaur, 475 U.S. at 480, Hunt's discharge at the December 20, 1982 meeting.[12] See pp. 7-8 supra. True, because the Commissioners were too "worried" to fire Hunt themselves, they did not explicitly order Hunt's discharge at that meeting. But they directed Beard to "take this matter under consideration, deal with it, and get it out of here."

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[12] That being so, there would have been no reason for the jury to have considered whether the full Board approved Hunt's discharge again after Gilmartin's April 26, 1983 recommendation.

P.Ex. 56 at 18 (emphasis supplied). To distance themselves from the decision to discharge Hunt, the Board recommended that Beard change Hunt's job description "and then, if he doesn't perform, he should be taken out of the organization." Id. at 19. But the jury surely concluded that the idea of revising Hunt's job description was a ploy, since Hunt was fired without any review of his job description even though he himself had asked for such a review. Pl. Exs. 24 at 2, 52 at 46; Tr. 268-69; see App. 5a ("Apparently nothing was done to revise Mr. Hunt's job description....").

Moreover, the record supports the court of appeals' conclusion that CHA's Board had not "merely approved [Hunt's] discharge," App. at 17a, but that it wanted Hunt "out of [CHA]" because it wanted to silence his criticism of CHA. Members of the Board had angrily challenged Hunt's right "to come before [the] Board," Pl. Ex. 51 at 34, to criticize CHA's inadequate elevator maintenance. See pp. 4-7 supra. Moreover, at the outset of the December 20, 1982 meeting, as the Board began to consider whether to discharge Hunt, Commissioner Finney said, "I have a problem seeing why [Hunt] would come to a Board meeting and publicly vent his frustration." Pl. Ex. 56 at 16. And none of the other Commissioners took issue with Finney. Id.

Indeed, the evidence supported the jury's finding that the Board's December 20, 1982 conversation about Hunt was a ruse designed at once to tell Mooney and Beard that the Commissioners wanted Hunt "taken out of the organization" for "com[ing] to [Board] meeting[s] and publicly vent[ing] his frustration" but, at

the same time, to give CHA a basis to try to deny responsibility or that decision - as it still does now in its petition.[13] CHA's argument to the contrary is a contention that a municipality's policymaking Board can violate someone's constitutional rights without subjecting the municipality to § 1983 liability by urging

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[13] While all three verdicts can be supported by either of the theories described above, the procedural due process verdict can also be affirmed because CHA's personnel policies limit discharges to instances of "just cause," Pl. Ex. 46 ¶ 2622, thus giving CHA's employees a property interest in their employment. See Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538-41 (1985). Yet Gilmartin admitted that "CHA generally [did not] conduct hearings regarding termination of employment." Tr. 149-50. Thus, CHA had a custom or usage of denying hearings before discharging tenured employees. See id., at 542-48.

CHA argues that "[t]here was absolutely no evidence that the Board knew that Gilmartin ... did not hold pretermination hearings...." Pet. at 9 n. 6. But by proving a custom or usage, "[a] § 1983 plaintiff ... may be able to recover from a municipality without adducing evidence of an affirmative decision by policymakers...." Pembaur, 475 U.S. at 481 n. 10 (plurality opinion); see, Monell, 436 U.S. at 690-91 (a municipality can be liable for an unconstitutional custom "even though such a custom has not received formal approval through the body's official decisionmaking channels."). And, in any event, since the Board reviewed all of Gilmartin's discharge recommendations and none showed a pretermination hearing, Tr. 141, it was reasonable for the jury to conclude that the Board itself acquiesced in the custom of discharging employees without such hearings.

CHA also argues that "there was no evidence that the number of employees who had not received pretermination hearings, or the length of time during which hearings purportedly did not occur, was great enough to constitute a ... 'custom or usage.'" Pet. at 9 n. 6 (citation omitted). But during Gilmartin's tenure as personnel director from late in 1982 until July of 1984, CHA employed approximately 2500 people, yet there were only two termination hearings, one of which was Hunt's post-termination hearing. Tr. 140, 149-50. To prove a custom or usage, "[t]he frequency and pattern of the practice ... [need only be] sufficient to give rise to a reasonable inference that the public employer and its employees are aware that the public employees engage in the practice ... with impunity." Cosby v. Ward, 843 F.2d 967, 983 (7th Cir. 1988) (quoting Webster v. City of Houston, 689 F.2d 1220, 1226 (5th Cir. 1982) (citations omitted)).

a subordinate to commit the unlawful act (and to concoct a pretextual reason to "justify" that conduct) so long as the Board never expressly orders the subordinate to do so. Were that the law, § 1983 liability would turn on whether the municipality's policymakers were astute enough to know how to wink and how to nod.[14]

II. THE CIRCUITS ARE NOT DIVIDED ON WHETHER THE ISOLATED ACTS OF ONE MEMBER OF A POLICYMAKING BOARD CAN SUBJECT A MUNICIPALITY TO § 1983 LIABILITY

CHA purports to rely upon a conflict between the Eighth Circuit and the Seventh Circuit below on the one hand, and the Fourth, Fifth and Ninth Circuits on the other. Pet. at 18-20. According to CHA, the Eighth Circuit, like the court below, is of the view that one member of a municipal policymaking body can subject the municipality to § 1983 liability; while the Fourth,

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[14] In the same vein, CHA contends (albeit not very vigorously) that it cannot be liable because its written personnel policies require adherence to federal law and recognize the rights of employees to disagree with CHA's Board. See Pet. at 6 n. 3 and 10-11. Indeed, in presenting its question, CHA formulates the even broader assertion that "discharging an employee in violation of his constitutional rights ... was in contravention of [CHA's] official agency policy." Pet. at i.

CHA's conclusory assertion that it had a policy prohibiting unconstitutional discharges is entirely question begging, since whether CHA's policymakers fired Hunt is precisely the question at issue and the court of appeals upheld the jury's finding that those policymakers (i.e., CHA's Board) did fire Hunt for unconstitutional reasons. And as to the narrower point (that CHA cannot be liable because its personnel policies require adherence to federal law and permit employees to disagree with CHA's Board), it is understandable that CHA does not press it vigorously, since "precatory admonition[s] against ... [an unlawful] employment practice ... [do not] insulate[] ... municipalit[ies] from ... liability based on acts inconsistent with that policy." Prapotnik, 485 U.S. at 130-31 (quoting id. at 145 n. 7 (Brennan, J. concurring)).

Fifth, and Ninth Circuits are of the view that a single member can not do so. Id. As respondent has previously explained, however, the court below did not even address the question of whether one member of a policymaking body can subject a municipality to liability. See Section I.A. supra. Accordingly, if there is a circuit conflict respecting the question CHA raises, the Seventh Circuit is not part of the split and, therefore, the question CHA posits cannot be resolved by issuing a writ of certiorari in this case.

In any event, however, no such conflict exists. CHA's contention to the contrary betrays its confusion between two methods of proving that a municipality is liable under § 1983 when no express municipal enactment (e.g. ordinance, rule, regulation) confirms the existence of an unconstitutional policy. The first method of proof is used when a plaintiff alleges that one or a few isolated decisions were undertaken by those officials in the municipal corporation who have final authority, as confirmed by state law, to make the relevant policy decisions for the agency. See e.g., Prapotnik, 485 U.S. at 114, 121-27; Pembaur, 475 U.S. at 471, 477-84.

The decisions that CHA invokes to establish one side of the supposed "split" simply illustrate of such "isolated acts" cases, in which the plaintiff must show that the acts were undertaken by those officials in the municipal corporation who have final policymaking authority--not, for example, by one member of a multi-member policymaking board if the single member is without authority

under state law unilaterally to establish policy. Collinson v. Gott, 895 F. 2d. 994, 1004 (4th Cir. 1990) (absent "evidence ... that the Board embraced any policy of silencing citizens at public hearings, or that it directly or by knowing inaction condoned [the Board president's] conduct [of evicting a citizen who was trying to speak at a public meeting, the Board president's] ... isolated act [cannot] be considered an exercise of policymaking power by one empowered to 'make policy' for the county in the matter at issue.") (citations omitted; emphasis supplied); Worsham v. City of Pasadena, 881 F. 2d. 1336, 1339-41 (5th Cir. 1989) (after reviewing "Supreme Court ... cases ... involving isolated acts by governmental employees," the court of appeals held that the Mayor's and Public Works Director's "single act" of suspending the plaintiff from his government job was not the act of the municipality because the City Council had the power to hear appeals from suspensions and reinstated the plaintiff pursuant to that power) (emphasis supplied); Lake Nacimiento Ranch Co. v. County of San Luis Obispo, 841 F. 2d 872, 878-79 (9th Cir. 1988) (the single act of one member of a county's board of supervisors who voted on a measure despite a conflict of interest, did not thereby subject the county to § 1983 liability when the county's general policy required disqualification whenever a conflict exists, state law required a majority vote of the board to establish official policy, and the board's general policy regarding conflicts had been

established by a unanimous vote).[15]

The second method of proving municipal liability when there is no written enactment confirming the existence of an unconstitutional policy is used, not when isolated acts are at issue, but when the plaintiff alleges that enough repeated instances of unlawful conduct prove the existence of a municipal custom or usage "so permanent and well-settled ... as to ... [have] the force of law." Monell, 436 U.S. at 691 (quoting Adickes v. S. H. Kress & Co., 398 U.S. 144, 167-68 (1970)); see Prapotnik, 485 U.S. at 127 (describing this "separate doctrine" for establishing a municipality's § 1983 liability by proving a custom or usage).

Harris v. City of Pagedale, 821 F.2d 499, 504-07 (8th Cir. 1987), which CHA invokes to establish the other side of the alleged split, illustrates such a "custom or usage" case. See id. at 506 ("evidence ... [that] clearly establishes that there was a pattern

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[15] CHA also cites two district court decisions and one state supreme court decision for the same side of the purported "split." Pet. at 19 n. 10 (citing Payung v. Williamson, 747 F. Supp. 705, 708-09 (M.D. Ga. 1990) (the single act of a Mayor, who was also one of the seven members of city council and who discharged the plaintiff from a government position, did not create municipal policy when the Mayor's "employment decisions were, by the very terms of the city's personnel ordinance, constrained by the review and appeals process of the City Council."); Young v. Peoria Housing Authority, 479 F. Supp. 1093, 1097 (C.D. Ill. 1979) (the single failure of one member of a municipality's Board of Commissioners to notify the plaintiff of the reasons for her discharge, which violated the whole Board's understanding that the notice would be given, did not establish a municipal policy of denying such notice in violation of plaintiff's due process rights); Todd v. Smith, 407 S.E.2d 644, 647 (S.C. 1991) ("The acts of [the city manager and the director of the city's convention center] ... involving a decision on how to handle a situation which has arisen ... only once in the entire history of Myrtle Beach ... cannot be translated as the acts of the city council or the City of Myrtle Beach.") (emphasis supplied)).

of sexual misconduct by City police officers, ... that on repeated occasions City officials in positions of authority and responsibility were notified of the offensive acts, but that upon receiving such notice, these City officials repeatedly failed to take any remedial action ... proved the existence of a municipal custom sufficient to support municipal liability under § 1983.") (emphasis supplied).

Unlike "isolated act" cases, however, a municipality can be liable for an unconstitutional custom "even though such a custom has not received formal approval through the body's official decisionmaking channels." Monell, 436 U.S. at 690-91 (emphasis supplied). "A § 1983 plaintiff thus may be able to recover from a municipality without adducing evidence of an affirmative decision by policymakers." Pembaur, 475 U.S. at 481 n. 10 (plurality opinion). Since Harris is a case about unlawful municipal customs, it says nothing about whether a single member of a policymaking board can subject a municipality to liability for isolated acts.[16]

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[16] After the Harris court held that the repeated acts were sufficient to prove the municipality's liability because of an unlawful custom, 821 F.2d at 504-05, it went on to consider whether the "members of the Board of Aldermen and the Chief of Police had the final policymaking authority to establish the municipal custom alleged." Id. at 506. But that discussion is dicta since, by proving a municipal custom, a plaintiff need not show that the "custom ... received formal approval through the [municipality's] official decisionmaking channels." Monell, 436 U.S. at 690-91. See Harris, 821 F.2d at 506 ("By definition, custom is unofficial, that is, a course of conduct that has not been approved through formal policymaking channels.").

(Footnote continued on the following page)

Of the five federal appellate decisions CHA cites as establishing a "split," the decision in Harris was the first in time and, according to CHA, it was the only case on one side of the split until the Seventh Circuit's ruling below. App. 18-19. In that context, if CHA's reading of the court of appeals' holding below is correct, and the split it describes exists, then one would have expected that the courts in Collinson, Worsham, Lake Nacimiento Ranch Co. and the panel below would have cited Harris and acknowledged that split. Yet none of those courts did so.

Indeed none of the appellate cases upon which CHA relies cite any of the other cases that, according to CHA, are part of the "split." So far as the decision below is concerned, that is

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16 (cont'd):

Even if one reads that portion of the opinion as essential, however, the Harris court did not hold that when a state's law makes a municipality's board responsible for making policy, the isolated acts of one member of such a board could subject the municipality to § 1983 liability. At most, it held that "the Board of Aldermen, as a whole, or its members individually, as well as the Chief of Police, ... had the final policymaking authority to establish a municipal custom of deliberate indifference to a known pattern of unconstitutional police misconduct." Id. at 507. To the extent that the inaction of municipal officials may make a city liable for a custom of unlawful deliberate indifference, the court's language is no more than a holding that, as a matter of Missouri law, the city's individual aldermen and its Chief of Police, not the Board as a whole, were the relevant officials.

Thus, CHA's quarrel with Harris is reduced to a disagreement about Missouri municipal law, hardly a basis for issuance of the writ CHA seeks. And whether or not the Harris court properly discerned that body of law, no holding on the issue of who has sufficient "authority to establish a municipal custom" in Missouri, id. at 507, could create a circuit conflict on the question CHA raises: when a state's law confirms that a Board of Commissioners has final authority to establish municipal policy, can the isolated acts of one Commissioner establish the existence of a policy that can subject the municipality to § 1983 liability?

because the panel did not even address the question as to which CHA says there is a split. See Section I supra. But the reason no appellate court saw CHA's "split" is because that "split" is the product of CHA's own wishful thinking and the exigencies of litigation, not the product of appellate decisions.[17]

CONCLUSION

CHA's petition should be denied.

Respectfully submitted,

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Dated: January 21, 1993

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[17] See also Circuit Rule 53(c) under which the Seventh Circuit publishes any decision that, among other things, "criticizes or questions existing law," or "creat[es] a conflict in the law." Yet the court of appeals did not publish its order in this case. App. at 1a. Accordingly, unless this Court assumes that the appellate panel knowingly transgressed its own rule, it is apparent that the panel did not see the circuit conflict CHA describes or, assuming it did perceive that conflict, it concluded that, since it was not addressing the question as to which there is a conflict, its decision did not implicate, much less, "deepen," Pet. at 18, that conflict.

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January 21, 1993

Mr. William K. Suter, Clerk
United States Supreme Court
Supreme Court Building
Washington, DC 20543

Dear Mr. Suter:

Enclosed please find the originals and one copy each of Respondent's Motion For Leave To Proceed In Forma Pauperis, Affidavit In Support Of Jerome Hunt's Motion To Appear As Respondent In Forma Pauperis, and Cetificate of Service. Also enclosed you will find the original and fourteen copies of Brief In Opposition To Petition For Writ Of Certiorari. Please return in the self-addressed, stamped envelope two stamped copies of the brief.

Thank you.

Very truly yours,

Jeffrey B. Gilbert
Attorney at Law

JBG:skp

Encs.

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No. 92-1002

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

CHICAGO HOUSING AUTHORITY,

Petitioner,

v.

JEROME HUNT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

CERTIFICATE OF SERVICE

Jeffrey B. Gilbert, respondent's counsel of record, certifies that he had three copies of each of Respondent's Brief in Opposition to Petition for Certiorari, Respondent's Motion for Leave to File In Forma Pauperis, and Affidavit in Support of Respondent's Motion to Appear as Respondent In Forma Pauperis, served by hand delivery on January 21, 1993 to each of the following addresses:

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